IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Supreme Court File Number 20040053
Grand Forks County File Number 95-C-1149

In the Interest of R.H.

Keith Berger, Director of Grand Forks County Social Service Board, Assignee for R.H., and the North Dakota Department of Human Services,

Plaintiffs and Appellees,

vs.

Mario Hernandez,

Defendant and Appellant.

APPEAL FROM THE CHILD SUPPORT JUDGMENT
OF THE GRAND FORKS COUNTY DISTRICT COURT

BRIEF FOR APPELLANT

Mario Hernandez
P.O. Box 5521
Bismarck, N.D. 58506-5521
no phone

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STATEMENT OF THE CASE

Mario Hernandez had been sued for child support back in 1995, but apparently no child support was enforced until about February 3, 1999. See Register of Actions #38, Appendix page 2 (R.A.#39, App.P.2). It was an off again--on again child support, depending on when Mario had custody of his son.

On November 16, 2000, Mario had custody of his son. Then he was arrested on November 16, 2000, and has been incarcerated since that time.

Mario's son was taken from him on November 16, 2000 by the Cass County Social Service agency, who then obtained custody of Mario's son, and who eventually terminated Mario's parental rights on May 29, 2002, Cass County Case Number J00-576 and Number J01-621. App.P.40-48 and 10.

On November 4, 2003, Plaintiff filed a "Motion to Amend Amended Judgment" and a Brief and Affidavit, asking for child support from the period of November 2000 through April 2003, when Mario's son was adopted. App.P.4-18; R.A.#85-88.

Mario was a single father who had custody of his son except for when social services intervened.

Before being arrested on November 16, 2000, Mario worked two full time jobs. $150 was deducted from his two paychecks every two weeks for both of his child support judgements. He had two children. Thus he was paying over $300 per month support for each child, even though

his support order for Rico, the subject of this suit, was only $217 per month at that time. Mario does not understand why he was being made to pay over $600 per month for both of his children. He just worked and they did what they did to him. His understanding of English was not that good. To clarify, the two jobs he worked were both 40 hour per week jobs--full time.

Mario filed his "Affidavit and Reply to Plaintiff's Motion to Amend Amended Judgment", dated December 5, 2003. App.P.19-48; R.A.#96.

At the time of Mario's arrest November 16, 2000, Mario lived in Fargo. Previously, he had lived in Grand Forks.

Judgment was entered on January 30, 2004. App.P. 49-57; R.A.#100-101.

Mario was served with an income withholding order on February 2, 2004.

Even though Mario was convicted in the Grand Forks Court for his crime and had an outstanding arrearage from before and was receiving "Billing Notices" from the State Capitol for the arrearage, Plaintiff claims that the reason they are suing Mario now is because Plaintiff says they have just "located" Mario in the penitentiary. See App.P. 11, paragraph #8; and see R.A.# 93 & 95,which is a handwritten letter dated November 4, 2003 and a typed copy of this letter attached to Mario's "Motion for Extension of Time to File a Reply" wherein Mario explains he has been

receiving the monthly billing notices from the State Capitol.

The District Court imputed income to Mario because he is incarcerated and ordered him to pay $168 per month.

Notice of appeal, dated February 14, 2004, was filed February 20, 2004. App.P.62; R.A.#105.

NO trial, no evidentiary hearing nor oral argument was had, and thus the only evidence the District Court had before it was that introduced by Plaintiff's Affidavit.

ARGUMENT

I. PLAINTIFF LACKS STANDING OR CAPACITY TO SUE.

Plaintiff did not furnish any support for the time frame sued for. Plaintiff's Affidavit at paragraph #7 states that Plaintiff did not provide support but the North Dakota Department of Human Services did expend money for support. App.P.11.

Part of Plaintiff's suit seeks to add the North Dakota Department of Human Services as a plaintiff. App.P.5, paragraph #5.

Plaintiff says they are entitled to sue pursuant to N.D.C.C. 14-08.1-01. App.P.8. This statute creates an entitlement to sue only if one has furnished support.

Standing requires that the party allege (1) a personal injury in fact, and (2) a violation of his own, not a third party's rights. Sioux Falls Argus Leader v. Miller, 610 NW.2d 76, 80 (S.D. 2000); Rebel v. Nodak Mut. Ins.

Co., 1998 ND 194, Par.#8, 585 N.W.2d 811, 813; Trinity Medical Center v. North Dakota Bd. of Nursing, 399 N.W.2d 835, 837 (N.D. 1987).

Because Plaintiff expended no money, then Plaintiff has no standing to sue.

In addition to or in the alternative to the above, Plaintiff lacks capacity to sue under N.D.C.C. 14-08.1-01.

Plaintiff has a legal disability depriving him of the right to come in to court because this statute does not entitle him to sue because he does not fit the criteria in that he furnished no support. 1A C.J.S. Actions, Sect. 59, defining capacity to sue; 67A C.J.S. Parties, Sect. 10 note 87 & 97 (A want of capacity to sue exists where there is a want of authority.).

This case should be overturned because Plaintiff lacks standing to sue, and/or lacks capacity to sue.

II. NO CONTRACT EXISTS.

The complaint/motion to amend fails to state a claim upon which relief can be granted. Or, since this is in motion form, the motion is insufficient in that it does not state with particularity the grounds for it. Rule 7(b)(1), NDRCivP.

No contract for reimbursement is alleged. And no contract exists. Hernandez made no agreement or contract to pay.

Thus the complaint/motion fails to state a claim upon which relief can be granted; or the motion is

insufficient because it does not state with particularity the ground therefore.

At common law a parent was not liable for the support of his child by another unless there was an agreement or contract for such. Flugel v. Henschel, 6 N.D. 205, 69 N.W. 195, 196 (1896).

N.D.C.C. 14-08.1-01 says that Hernandez is liable for the support furnished if he is legally responsible, that is, if he agreed to pay. And thus 14-08.1-01 creates no liability in this case because no contract is alleged by Plaintiff nor was one made by Mario Hernandez.

However, if the words "A person legally responsible" as used in the statute does not mean this, then this statute is unconstitutional as it authorizes the taking of Hernandez's property without due process of law as it takes property even though no contract exists to authorize the taking.

If this statute authorizes the taking of Hernandez's property without an agreement or contract for such, then this statute is unconstitutional, violative of due process of law.

~~Thus~~ This motion to amend must be denied either because there is no contract to pay, or because the statute is unconstitutional.

III. HERNANDEZ MADE NO APPLICATION FOR FOSTER CARE.

The motion to amend fails to state that Hernandez made an application for foster care to Plaintiff, the

county agency.

N.D.C.C. 50-09-06.1 (pre-2001 amendment) and 50-09-06 (as amended in 2001) state that an application for foster care must be made to the county agency. And that this application is then deemed to create and effect an assignment of support rights to the state agency--50-09-06.1 (2001 amended statute), or the application creates an assignment to both the state and county agencies--50-09-06.1 (pre-2001 amended statute).

Since Hernandez made no application for assistance, there is no contract or agreement to pay for support furnished. There is no assignment of support rights which Rico may have or come to have.

Thus Plaintiff has no cause of action under this statutae or lacks standing or capacity to sue Hernandez because no application for assistance exists.

The judgment must be overturned.

As an observation: There is a difference between a parent bringing their child to social services because they can not handle the child and thus the parent makes an application for assistance, and when social services takes the child from the parent. See 42 U.S.C. 672(f).

Also, it must be noted that Plaintiff did not take Rico from Hernandez. It was Cass County who took Rico. And thus if one is to read the statute loosely as Plaintiff does, then it should be Cass County who should be suing Hernandez, not Grand Forks County.

Also, 50-09-06.1 (as amended in 2001) says that the assignment is only to the state agency. Thus it should be the state agency, not Grand Forks County, who can sue under this chapter. Thus here again Plaintiff lacks standing or capacity to sue.

The motion to amend must be denied.

IV. A CHILD IS INCOMPETENT TO MAKE AN ASSIGNMENT.

N.D.C.C. 50-09-06.1 deems that a child makes an assignment of his own right to the agency.

A child is legally incompetent to make an assignment of a support right, to sue another, etc. At common law, infants can not delegate or assign their power, authority or rights. Wambole v. Foote, 2 N.W. 239, 240-241 (Dak.Terr. 1879); Dimond v. Kling, 221 N.W.2d 86, 91 (N.D. 1974). A minor can not even sue another, except a guardian ad litem be appointed for him. See Dimond v. Kling, id., page 88, where the child, through his guardian, sued the defendant.

A child can not consent freely and fully, but is allowed to withdraw his consent upon adulthood. Thus for this reason also the assignment is null because the law deems a child's consent to be retractable upon attaining adulthood.

A judgment based upon this 'voidable' consent is thus an uncertain judgment and thus is a void judgment. A judgment must be certain and absolute to be valid. Thus where it is known that the judgment can not be absolute and final because the consent is not absolute and final,

then the judgement is void. See 49 C.J.S. Judgments, Sect. 20 & 82. No court has the jurisdiction to render a judgment when the child can later retract his assignment of support right and his right to sue his father, and thus the law suit and the judgment and the child support paid must be reversed and refunded to the father.

Also, a child does not have a right to sue his parent. A child can not sue his parent for support, including support for a college education. See Yarborough v. Yarborough, 290 U.S. 202, 210, 54 S.Ct. 181, 184 (1933).

And a child has no support right because the obligation of a parent to support his child does not vest in the child a property right of support. Yarborough, id.

Thus there is no support right which Rico could assign to Plaintiff. Nor is there a right to sue his father which Plaintiff can acquire, because an assignment confers no greater benefit than that which the assignee had.

For the above several reasons the assignment is invalid and thus there is no valid judgment for child support.

The assignment created by N.D.C.C. 50-09-06.1, as it relates to infants, is a nullity, effectuates nothing. Or alternatively, if this statute is deemed to create a valid assignment, then the statute is unconstitutional as it takes property without due process of law, contrary to the common law.

The motion to amend must be denied.

V. NO DETRIMENT OR LOSS EXISTS IN THIS SUIT AND THUS COMPENSATION, INTEREST, CAN NOT BE GIVEN; AND ADDING INTEREST IS OPPRESSIVE.

The judgment added interest to the arrearage pursuant to N.D.C.C. 14-09-08.19 and 14-09-25(5). App.P.56.

Child support is not based upon contract nor tort. Detriment or loss is not an element of this suit.

Interest is compensation. Since detriment is not an element then there is nothing to be compensated and thus interest can not be granted or ordered.

Child support is not a debt, it is not money due and owing. No detriment exists. It is an obligation. And an arrearage is merely a past due payment and thus also is not a debt. A past due payment, the arrearage, is not only not a debt, but it derives from an obligation which is also not a debt, is not a loss or detriment.

Compensation, interest, is being given for something which is not compensable and for which compensation can not be asked for or granted because the suit is based upon an obligation and a past due payment, not a detriment or loss.

Granted, an obligation and a past due payment, arrearage, sounds and looks like a debt, but it is not and thus the distinction must be observed. If child support was a debt or based upon detriment, then one could not be held in contempt of court and put in jail for non-payment of a debt, for one can not be imprisoned for debt.

The obligation of support has and can have no interest

provision, that is, no compensation for the use of money or for the withholding of money. Compare this to a contract in which interest, compensation for the use of the money, is part of the contract term.

A judgment does not create facts, but only finds and states the facts as they existed between the parties.

Here, the District Court has added compensation, interest, which is not a part of the original obligation for child support and also is only a past due payment, the arrearage.

The District Court is without jurisdiction to render a judgment for compensation, interest, when the facts do not exist for such.

Nor does the Legislature have an authority to add to the facts of the case by adding interest as a fact or element of the obligation which is not a debt.

The statutes authorizing or creating compensation, interest, is a taking of property without due process of law as the statutes create a compensation for something which is not compensable as it is not a debt. It is only an obligation and a past due payment, not a debt.

And likewise the judgment is a taking of property without due process of law.

SECOND: Adding interest to this type of case is oppressive and burdensome to the poor, to those who have fallen on hard times.

It is illegal to oppress, not only the poor, but

those who have a surplus of income.

The Constitutional right and acknowledgement that government was instituted to protect and insure our Pursuit of Happiness includes the people's right to be free from or exempt from oppression. State v. Cromwell, 9 N.W.2d 914, 918 (N.D. 1943); Preamble, U.S. Constitution; Declaration of Independence; N.D. Constitution, Article I, Sections 1 and 2.

Oppression is an act of cruelty, severity, unlawful exaction, or excessive use of authority, an act of subjecting to cruel and unjust hardship, or an act of domination. Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 756 n. 7 (N.D. 1989); Black's Law Dictionary, 4th Ed. defining oppression.

A person of modest means, who lives from paycheck to paycheck suffers greater distress from economic injuries than one who can comfortably cover unexpected bills; economic anguish is an oppression. Olmstead v. Miller, 383 N.W.2d 817, 825 (N.D. 1986), Meschke, concurring and dissenting.

Oppression is unnecessary harshness or severity via misuse or abuse of authority or power. Dunfee v. Baskin-Robbins, Inc. 720 P.2d 1148, 1155 (Mont.); Black's Law Dictionary, Sixth Edition defining oppression.

On December 5, 2003, Hernandez served by mail his Reply to Plaintiff's Motion To Amend. App.P.19-37; R.A.# 96. On December 15, 2003, Plaintiff broadcast a two page letter talking about how the federal and state governments

have "expanded the enforcement tools" to collect child support. A copy of this letter is at Appendix Page 60-61.

This letter discusses interest, suspension of various licences, such as driver's, hunting, occupational and business licenses and car registrations, etc. And increasing the payment when no child support is owed except arrearages, and public embarrassment and humiliation by public advertisement if one owes more than $25,000, denial of passports, and requiring employers and the lottery to automatically withhold money. This is in addition to the income withholding which is also used to enforce the mandatory injunction ordering the parent to fullfill his duty or obligation. A child support order is a mandatory injunction enjoining the parent to do his duty. It is not a money judgment that the parent owes money. It is only an injunction ordering the parent to fullfill his obligation, and that the obligation is for a certain dollar amount, in this case the amount is $168 per month.

Here, Plaintiff says or recognizes that interest is not compensation, but is an enforcement tool.

Abuse of process occurs when one uses civil or criminal process against another to accomplish a purpose for which the process was not designed; the ulterior motive or improper purpose can take the form of coercion to obtain a collateral advantage, such as in this case the payment of arrearages or child support by using the process (or power) as a threat or club--(if you do not pay us now

then we will do this to you type of threat). Stoner v. Nash Finch, Inc., id., page 751.

Abuse of power is akin to abuse of process. It is using one's power to accomplish a purpose for which the power was not designed. For example, the State is using its police power relating to driver's, occupational, etc. licenses as a club to coerce payment for arrearages. And the State is using its power to legislate by enacting a statute creating interest at 12% to coerce payment from those who have the surplus of income with which to pay the arrearage. (You can not squeeze blood from a turnip, from a poor man.) For a poor man, the interest makes his child support almost perpetual, almost never ending. For $1,000 of arrearages, 12% increases his payment by $10 per month. For $10,000 of arrearages, his payment is now increased by $100 per month. For a poor man, every dollar is important. Interest is a heavy handed burden to a poor man, an exercise of power which accomplishes nothing ~~for~~ because the reason the poor man did not pay his support and thus accumulated an arrearage is because he was poor. Adding interest to his burden is not going to make nor enable him to pay his burden any faster.

Thus here the State is abusing the powers given to it, the police power, the power to legislate, etc., and is using these powers to enforce the mandatory injunction, even though the due process of law contempt of court is available if one is willfully and maliciously disobeying

the injunction. These powers were not designed for this purpose. The police power was designed to promote and secure the peace of the community, etc. And the power to legislate was designed to put the Constitution in to effect. Article IV, Section 13, N.D. Constitution. The power to enact statutes was not designed to give the State power to enact statutes which take property without due process of law, in this case by enacting a statute creating interest so as to collect child support when due process of law only provides for contempt of court to enforce an injunction.

Further, the State is even exercising a power which Hernandez is not aware even exists, that is, of publishing and broadcasting pictures and names of those who have arrearages in an attempt to embarrass and humiliate them in to obeying the injunction. This is plain defamation, for libel exists even if one speaks the truth (that they owe arrearages), but there is no valid reason for speaking the truth, for exposing one's weakness or sin. Public humiliation and embarrassment to shame one in to compliance with the injunction is not a valid reason for publishing one's 'sin'. Contempt of court is the due process of law method. And to use this libel to try to locate a defaulting person is likewise wrong because the default is a private wrong, not a public wrong, the parent is not a threat to the public.

Thus the State and Plaintiff are using the powers of the police power, the power to legislate, and any other

power, existing or not existing, as a club to collect arrearages, if you do not pay me now, then I will use this power to do this to you.

These are all abuses of power because they take life, liberty and property without due process of law, contrary to the procedure of the common law.

These abuses are acts of oppression, are oppressive.

These abuses, these "enforcement tools" as stated in Plaintiff's December 15, 2003 letter, App.P.60-61, are unconstitutional as they deny Hernandez's right to the Pursuit of Happiness. And they violate due process of law.

Not only should this exorbitant 12% interest be declared illegal, but all the enforcement tools should be declared illegal.

Plaintiff is using everything but court action via contempt of court to enforce his judgment for him. Plaintiff sits back and 'twiddes his thumbs' while he lets other people, agencies, privileges and benefits enforce the judgment for him, taking advantage of the abuse of power to oppress Hernandez in an attempt to squeeze him in to compliance with his desire. Plaintiff is using the State's excessive use of authority and domination as a club over Hernandez. Plaintiff is subjecting Hernandez to cruel and unjust hardship by using the State's abuse of power.

The motion to amend must be denied, and plus all these other enforcement tools must also be declared

unconstitutional.--If perhaps this Court can see its way to do this, one can raise a new issue on appeal when, for example, it is one of sufficient public concern. Roise v. Kurtz, 1998 ND 228, Par.#18, 587 N.W.2d 573, 575-576, dissenting opinion.

VI. THE MOTION/COMPLAINT FAILS TO STATE THAT HERNANDEZ HAS AN INCOME.

The complaint/motion to amend fails to state a claim upon which relief can be granted, or the motion is insufficient.

It fails to allege and does not state that Hernandez has an income from which an order or injunction for support can be granted.

The motion to amend must be denied.

VII. AN IMPUTED INCOME IS NOT A FACT.

Plaintiff sued based upon, not an income, but upon an 'imputed income', this pursuant to regulations promulgated, N.D.A.C. 75-02-04.1-07(3)(a) and 75-02-04.1-09(5). App.P.5, 8, 11, 50 & 56.

Plaintiff and the District Court thereby declare and say that Hernandez has an income of $10,320, this even though in actuality he has no income. He is incarcerated in prison. And thus Plaintiff and the District Court say they can order him to pay $168 per month for child support.

This use of an imputed income is illegal and unconstitutional because it is not a fact. A court only

has jurisdiction over facts. A cause of action is made of facts, "de facto" facts, that is, facts which actually exist, which have actually occured.

An imputed income is not income. It does not actually exist, it has not occured. It is only a creation, a fiction, a "de jure" fact. It is only a "should be" income or a "could be" income or a "would be" income or a "might be" income. It does not actually exist. Hernandez does not actually have this income.

A fact is that which has taken place, not what might or might not have taken place. Black's Law Dictionary, Fourth Edition, defining fact; State v. Bougneit, 294 N.W.2d 675, 679 (Wis.App. 1980). A fact is what exists, in contradistinction to what should exist (de facto as contrasted with de jure). Black's, id.

Plaintiff and the District Court impute income because they say that Hernandez's income "could be" or "would be" or "might be" at least minimum wage, $10,320 per year if he had not committed his crime and had not been incarcerated, thereby losing his job or not being able to work.

The complaint/motion to amend fails to state a claim upon which relief can be granted, or the motion is insufficient, when an imputed income is used as the basis for the cause of action. The District Court is without jurisdiction to render a judgment upon something which is not a fact. The motion and judgment must be overturned.

VIII. THE STATUTES DO NOT AUTHORIZE AN IMPUTED INCOME.

The statutes authorizing child support guidelines to be administratively made do not authorize an imputed income as a guideline. N.D.C.C. 14-09-09.7 and 14-09-09.10(5, 6, 8, 9 & 13).

14-09-09.7(1)(c) says that a guideline may designate other available resources for income purposes. Here, this refers to a resource which exists, a fact. A resource which could or should or might exist is not a fact. This subsection "c" does not mean an imputed income, or, if it does, then it is unconstitutional as it would create a fact and thus take life, liberty and property without due process of law. It would create a cause of action at the whim and caprice of whomever, the public, legislature, the government agency, etc., even though in truth no basis for a cause of action exists nor existed. The case of Surerus v. Matuska, 548 N.W.2d 384, 386 (N.D. 1996) relies upon this subsection "c" as authorizing an imputed income. This case can not be stare decisis because it did not consider the meaning of the word fact and the common law and due process requirement that only facts can be the basis for a cause of action and that a court only has jurisdiction to render a judgment upon the facts found and the law arising from the facts. "Surerus v. Matuska" is not stare decisis, is not a controlling decision because it did not consider all the issues. It must be overturned.

The child support guidelines must be declared

unconstitutional from a due process of law viewpoint, as well as a statutory viewpoint in that the statutes do not authorize such a guideline, or if the statutes do, then likewise they are illegal and unconstitutional.

The judgment of the District Court must be overturned.

IX. A NONREBUTTABLE MANDATORY MINIMUM ORDER IS VOID.

The Federal statutes relating to child support and the Supremacy Clause of the U.S. Constitution do not authorize a judgment based upon a non-rbuttable mandatory minimum child support order of $168 (due to an imputation of income), and they forbid it. 42 U.S.C. 667(b)(2); In re Marriage of Gilbert, 945 P.2d 238, 242 (Wash.App.Div.I 1997) (The Federal mandate gives the prisoner and parent the right to rebut any presumed support amount all the way down to zero, by showing a lack of income with which to pay.). N.D.C.C. 50-09-02(16) and 50-09-03(5).

The guidelines are unconstitutional wherein they **create** an irrebutable minimum payment due to imputation of income.

The judgement must be overturned.

X. THERE IS NO AUTHORITY TO SUE FOR ARREARAGES.

The statutes authorizing a suit for child support only authorize a suit for support, not for an arrearage. N.D.C.C. 14-09-08 and 14-08.1.

Plaintiff can not sue for a judgment and the District Court can not render a judgment when it is known because of defendant's lack of income to pay the support immediately

upon rendition of the judgment that no payment will be made and can not be made.

The statutes only authorize an order or judgment for support, not for an arrearage. Using an imputed income creates an order or judgment, not for support, but for arrearages.

A court only has jurisdiction to render a judgment for support, not for an arrearage.

The judgment must be overturned.

XI. A CHILD SUPPORT SUIT IS A PRIVATE SUIT.

The State of North Dakota and the Counties of N.D. can not take on what is a private suit.

Child support is a private matter between citizens.

It is an abuse of power for the State's Attorney and the State and Counties and their agencies to represent an assignment of a citizen's litigous right and sue based upon that assignment. Here, plaintiff is suing based upon an assignment or deemed assignment from Rico, the son of Hernandez. App.P.7 & 10.

The North Dakota Constitution, Article I, Section 2, states that the reason this government was established was not to take sides in private disputes, not to take assignments of private litigous rights and sue us, but to protect, secure our rights and benefit the people. Under the United States Constitution, this purpose of government is the same, to establish justice, insure domestic tranquility, promote the general welfare or well-

being of the people, and to secure the blessings of being a free people; not to take sides in private disputes and thus sue us, not to stir up litigation. Preamble, U.S. Constitution.

The purpose of the Preamble is to define when the government has abused the power given to them, when the government has exceeded its jurisdiction; the purpose of the Preamble is to declare the nature, extent, and application of the powers actually conferred by the constitution. U.S. v. Boyer, 85 F. 425 (W.D.Mo. 1898). The purpose of the Preamble and of Article I, Section 2 of the N.D. Constitution is to define an abuse of power or an acting in excess of the power given to the government.

Government was not created for the purpose of becoming the antagonist or opponent of the citizen or of taking sides in a private dispute and thus sue the other citizen. Rather, the purpose of government was to provide a forum wherein citizens can peaceably resolve their private disputes, that is, to promote domestic tranquility.

Those statutes wherein the State and County and its agency take assignments of a citizen's litigious right and give them to the government or its agent are unconstitutional because they exceed the power and jurisdiction given to the government, the statutes authorize an abuse of power. These and any other statutes are illegal: N.D.C.C. 14-09-08.1; 11-16-01(15); 50-24.1-02.1; and 50-09-06.1; see Mehl v. Mehl, 545 N.W.2d 777, 779

N.D. 1996).

Plaintiff's motion to amend and the District Court's judgment and its prior judgment should be annuled. Plaintiff has abused his power and has relied upon statutes which are in excess of or beyond the jurisdiction of the State to enact. And thus the judgment of the District Court is void and unconstitutional. An abuse of power can not be used as a basis for a cause of action and a judgment, nor to give Plaintiff an authority to become a plaintiff.

As a question or note: Even though N.D.C.C. 11-16-01(15) is still void, a reading of it does not authorize the State's Attorney to represent Plaintiff in prosecuting and suing out his complaint. Thus the State's Attorney does not have an authority to act as the attorney for Plaintiff. Thus the judgment should be overturned for this reason also.

XII. THIS SUIT AND JUDGMENT IS BASED UPON CHAMPERTY.

The Plaintiff and the State's Attorney are guilty of champerty and maintenance.

They have taken an assignment of Rico's litigous right and are suing to obtain the proceeds of what is Rico's suit.

They have stirred up strife and litigation against Hernandez to the disturbance and hinderance of common right. They have intermeddled to enforce Rico's litigious right. They made the assignment for the purpose to stir

up litigation and to collect money for the Plaintiff, the State and the United States government--(part of the proceeds must be sent to the federal government according to federal statute and the agreement the State made with the federal government when they accepted the federal welfare funds).

Plaintiff took on this suit at their expense in consideration of receiving the whole or part of the proceeds.

The assignment was made and created and taken with the intent and purpose to sue, to stir up litigation and profit or benefit from it, to sue when Rico would not have done this of his own will.

Assignments taken for the purpose or motive of stirring up litigation and profiting or benefiting thereby are champertous and prohibited under the common law. Elliott Associates, L.P. v. Republic of Peru, 12 F.Supp.2d 328, 351 (S.D.N.Y. 1998).

Champerty and maintenance is "founded upon the pinciple common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce". Elliott Associates, id., page 350.

The assignment is void because it is champertous. Thus Plaintiff has no standing to sue. The suit and judgment must be overturned.

Hernandez notes that even though the legislature enacted statutes creating or deeming the assignment, that even though they are statutes, as far as this Court can be concerned, this is simply evidence of champertous conduct by the Plaintiff and State and thus the assignment is still void because this Judicial Branch of Government has to act as a checks and balance on the power of the Legislative and Executive Branches and bar Plaintiff from using his champertous conduct to sue in court. A court is without jurisdiction to allow a plaintiff to proceed forward when his standing to sue or capacity to sue is based upon champerty.

These assignment statutes which create, deem or force the giving of the assignment are unconstitutional as they exist to take Hernandez's property without due process of law, contrary to the common law, to the disturbance and hinderance of common right, the right to repose, the right to not be disturbed in one's peace, to not be sued when the real plaintiff had no desire to sue or would not have sued but for the officious intermeddling of Plaintiff.

The assignment was deemed and created so as to force or stir up the suit. The reason the welfare statutes and assignments were enacted was because the mothers on welfare and the foster children were not suing of their own free will. And so the States and the Federal Government enacted these statutes and assignments so that they could

stir up the litigation so as to collect reimbursement to reduce their welfare payouts.

This is champerty and maintenance, contrary to the law of the land. And when the government has their hand in it, their statutes and conduct is a taking of property without due process of law. Neither the government nor a private citizen can sue based upon a champertous assignment.

The judgment must be overturned. And the statutes forcing and deeming and creating the assignments should be declared unconstitutional.

XIII. THERE IS NO AUTHORITY TO REPRESENT THE STATE DEPARTMENT OF HUMAN SERVICES.

Plaintiff and the State's Attorney have no authority to represent the North Dakota Department of Human Services.

Plaintiff asks that the N.D. Department of Human Services be added as a plaintiff to the suit.

The Grand Forks County Social Service Board is given statutory authority to administer the child support enforcement program and to contract with a private or public agency or person to discharge their enforcement duties. N.D.C.C. 50-09-03(5).

However, no statutory authority exists for representing the State agency. In fact, the state agency has no authority to sue. N.D.C.C. 50-09-02(16).

No other fact was introduced on the record showing that Plaintiff and the State's attorney can represent

the North Dakota Department of Human Services.

In fact, the Department has no authority to sue.

Thus the North Dakota Department of Human Services can not be added as a plaintiff.

The judgment must be overturned.

XIV. THE DISCOUNT FOR THE TERMINATION OF PARENTAL RIGHTS WAS NOT GIVEN.

Note: this issue ruled in District Court - Feb. 26, 2004.

Mario Hernandez's parental rights over Rico was terminated on May 29, 2002. App.P.40-48, 50, 58.

Yet the judgment asks that Hernandez pay $5,040, which is $168 per month times 30 months, November 2000 through April 2003. It should be $3,192, which is $168 per month times 19 months, November 2000 through May 2002.

Thus the judgment must be overturned and corrected.

XV. PLAINTIFF MADE NO ATTEMPT TO PLACE RICO WITH RELATIVES.

The complaint/motion to amend fails to state a claim upon which relief can be granted, or the motion to amend is insufficient. This is because no allegation is made that Plaintiff made an attempt to place Rico with relatives before placing and keeping him in a foster home.

Plaintiff is using his voluntary act of providing for Rico as a reason to sue Hernandez.

One can not use one's voluntary act, and in this case officious act, that is, over eager desire to take custody of Rico rather than seeing if a relative would

take custody of Rico, as a reason to sue for the cost of the custody.

Plaintiff is estopped by his own conduct from suing Hernandez.

As a supportive argument: It should be and is public policy to reduce the costs of the government welfare programs. This policy is reflected by the fact that the generous and liberal welfare benefits for AFDC, Aid for Dependent Children, was changed to TANF, Temporary Aid for Needy Families. The welfare liberality was reduced down to a maximum of five years of eligibility for mothers on welfare.

Second: Plaintiff's conduct ignored the family and blood. Family and blood and the protection of it should be the policy of the State. If there is no current case law, statute, or other declaration on this subject, then Hernandez asks this Court to declare that it should be the public policy of the State to foster and protect family and family ties and thus should first make inquiry of the family to see if they are willing to take custody of a child before the State puts a child in a foster home.

Mario Hernandez's feeling on how the Cass County Social Services handled his son, Rico, is: "They treated my son as if he was a dog, a puppy."

Hernandez has a strong paternal drive. He had custody of Rico from birth. Family is important to him. To illustrate: Hernandez was living and working in Fargo

in the year 2000. He was working two jobs, full time jobs. $150 was taken from each of his two paychecks every two weeks for child support. He was paying over $600 per month total in child support. He had custody of Rico, Rico was living with him. Yet on October 20, 2000, he was arrested and hauled to Grand Forks for not paying child support. R.A.#75, etc. When he got in front of the judge on Oct. 20, he told the judge that $150 was being deducted from each of his two paychecks every two weeks. The judge released him on the condition he would come back with proof of this. So Hernandez's girlfriend came from Fargo and brought him back home. The next day Hernandez came back to Grand Forks with copies of his pay stubs showing that $150 was being deducted for child support from each of his two paychecks every two weeks. No explanation was given to Hernandez as to what was going on. The point of all this is to show the drive Hernandez had to support his son, and to show that there is a problem with Plaintiff--(is there an external audit of Plaintiff to make sure that the money being taken for child support is getting to the State treasury). Hernandez to this day does not understand why $150 was being deducted from each of his two paychecks every pay period, every two weeks. Whether or not this Court feels there is a question here, this Court may want to require Hernandez to appear for oral argument on this appeal so that they can make inquiry as to what is going on, and make inquiry as to

the fact that Hernandez did try to get Cass County to let a relative have custody of Rico--some points are better stated orally as opposed to in writing. (Currently the policy is that a prisoner is not allowed to come to oral argument unless this Court is willing to issue a transport order or habeas corpus writ.) Also one has to personally meet with and talk with Hernandez so as to understand that he is a family man. (Just because one has a criminal record does not mean he is not human.)

Plaintiff's conduct is arbitrary in its treatment of children, at least in this case.

Plaintiff is estopped from suing for support because of its own officious conduct in taking custody of Rico without first seeing if a relative would take custody.

XVI. HERNANDEZ WAS DENIED THE BENEFIT OF THE TRIAL COURT'S OPINION ON HIS DEFENSES.

The District Court issued a summary opinion. See App.P.58, which is a copy of the trial courts Memorandum Decision.

Hernandez is entitled to the benefit of the District Court's opinion on his defenses.

For a court to not address the issues is to say that Hernandez can be summoned to appear in court, but once he has appeared he shall not be allowed to defend, for if he does raise a defense the court just will not hear it, will not address and decide it.

Hernandez is entitled to the benefit of the Court's

opinion, as otherwise he is being denied the right to defend and the right to a trial, a full trial on all the issues. A trial is not a trial when one's defenses are not heard and discussed and decided and determined, are not examined and tested. A trial means to try, that is, to examine and test and sift through.

A judgment which is rendered without the issuance and service of a summons against a defendant who did not enter an appearance is obviously void, the court being without jurisdiction to do so; and likewise, looking at the substance and not the form, where Hernandez's defense is not heard and determined, then of what efficacy or avail was the summons for Hernandez to appear and defend when the Court which issued the summons rendered its decision upon the theory that the summons was inefficacious as Hernandez had no right either to appear or be heard on his defense, and thus the Court's decision is void for lack of jurisdiction to render a decision because in substance there is a lack of process being served on Hernandez and because in substance Hernandez did not enter an appearance because he had no right to appear and assert a defense and to have it heard and determined. Hovey v. Elliott, 167 U.S. 409, 444-445, 17 S.Ct. 841, 855 (1897).

The District Court's judgment is void because he was denied the benefit of the Court's opinion on the defenses. That is, Hernandez was denied his right to appear and defend, and was denied his right to a trial,

to have his defenses put to the test, to be tried. And the judgment is void because Hernandez was not served with process and he did not make an appearance, this as a matter of law due to the District Court's conduct.

The judgment must be overturned.

CONCLUSION

Wherefore, Hernandez prays this Court to overturn the judgment.

Dated this 25th day of February, 2004.

Mario Hernandez
P.O. Box 5521
Bismarck, N.D. 58506-5521

CERTIFICATE OF NO COMPUTER

I declare that this was typed on a typewriter and thus I have no computer disk I can send this Court.

Dated this 25th day of February, 2004.

Mario Hernandez

CERTIFICATE OF READING

I declare that every word of this brief was read to me. I did not write this brief.

Dated this 26 day of February, 2004.

Mario Hernandez